No. 06-516

Supreme Court, U.S.
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# In The Supreme Court of the United States

**DWAYNE ROSS, MARIA ROSS,
Individually and as Next Friends of
SYDNEY ROSS and JOHNATHON ROSS, Minor Children;
SYDNEY ROSS, Minor Child;
JOHNATHON ROSS, Minor Child,**

***Petitioners,***

**v.**

**ALLSTATE TEXAS LLOYDS
INSURANCE COMPANY,**

***Respondent.***

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

After a judgment was entered against Kent Mathews, he asked his insurer, Allstate Texas Lloyds Insurance Company to post a supersedeas bond to protect him from the judgment. Allstate refused. To protect himself, Mathews entered into an agreement whereby he assigned his bad faith action against Allstate to the plaintiffs and dismissed his appeal. To protect its own coverage interests, Allstate sought to intervene post-judgment to pursue the appeal. The district court denied Allstate's motion to intervene. The Fifth Circuit panel held that the district court was required to grant Allstate's motion to intervene **as a matter of right**, and to appeal the case on the merits, without being a party to the judgment and without posting a supersedeas bond.

Several questions are raised concerning the proper construction of Rule 24(a) of the Federal Rules of Civil Procedure:

- Does Rule 24(a) require a district court to grant a non–party insurance company's motion to intervene as a matter of right when that insurance company asserts only a contingent interest in the judgment?

- Does Rule 24(a) require a district court to grant a non-party insurance company's motion to intervene as a matter of right when that insurance company can fully protect its interests in a separate pending coverage lawsuit?

- Does Rule 24(a) require a district court to grant a non-party insurance company's motion to intervene as a matter of right when that insurance company was not the real party of interest and was not in privity with its insured?

- [unbriefed issue] Did the district court abuse its discretion by denying Allstate's post-judgment motion to intervene as untimely?

## PARTIES TO THE PROCEEDING BELOW

Petitioners Dwayne Ross and Maria Ross appeared individually and as next friends of their children, Sydney Ross and Johnathan Ross, and were the Plaintiffs/Appellees below.

Respondent Allstate Texas Lloyds Insurance Company was not a party to the proceedings in the district court but was the Appellant below.

Kent Mathews, Allstate's insured, was the Defendant in the district court, but did not pursue an appeal from the judgment. He was not a party to the proceedings in the court of appeals and is not a party here.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING BELOW ..... iii

TABLE OF AUTHORITIES ..... vi

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

RULE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 5

I. Allstate Could Not Intervene As A Matter Of Right Because Its Interest Was Contingent ..... 7

II. Allstate Could Not Intervene As A Matter Of Right Because Its Rights Can Be Resolved In A Separate Suit ..... 11

III. Allstate Could Not Intervene As A Matter Of Right Because It Is Not Bound To The Judgment Against Its Insured ..... 13

CONCLUSION ..... 16

APPENDIX ..... 17

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*AAL High Yield Bond Fund v. Deloitte & Touche LLP*,
361 F.3d 1305 (11th Cir. 2004) ..... 9

*American Pipe & Const. Co. v. Utah*,
414 U.S. 538 (1974) ..... 6

*Bender v. Williamsport Area School Dist.*,
475 U.S. 534 (1986) ..... 6

*Bolden v. O'Connor Cafe of Worcester, Inc.*,
50 Mass. App. Ct. 56 (Mass. App. Ct. 2000) .... 6, 9

*California Fed. Sav. & Loan Ass'n v. Guerra*,
479 U.S. 272 (1987) ..... 5

*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,
386 U.S. 129 (1967) ..... 5

*Cluett v. Medical Protective Co.*,
829 S.W.2d 822 (Tex. App.—Dallas 1992,
writ denied) ..... 14

*Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*,
987 F.2d 1124 (5th Cir. 1993) ..... 14

*Commercial Cas. Ins. Co. v. Fruin-Colnon Contracting Co.*,
32 F.2d 425 (8th Cir. 1929) ..... 14

**Table of Authorities** (continued)

**Cases** **Page(s)**

*Crown, Cork & Seal Co., Inc. v. Parker*,
462 U.S. 345 (1983) ..... 6

*Deus v. Allstate Ins. Co.*,
15 F.3d 506 (5th Cir. 1994), *cert. denied*,
513 U.S. 1014 (1994) ..... 11, 12

*Devlin v. Scardelletti*,
536 U.S. 1 (2002) ..... 5

*Diamond v. Charles*,
476 U.S. 54 (1986) ..... 6

*Donaldson v. United States*,
400 U.S. 517 (1971) ..... 5, 8

*Employers Cas. Co. v. Block*,
744 S.W.2d 940 (Tex. 1988) ..... 15

*Employers Casualty Co. v. Tilley*,
496 S.W.2d 552 (Tex. 1973) ..... 14

*Hawaii-Pacific Venture Capital Corp. v. Rothbard*,
564 F.2d 1343 (9th Cir. 1977) ..... 12

*Healthsouth Corp. Ins. Litigation*,
219 F.R.D. 688 (N. D. Ala. 2004) ..... 9

*In re Kaiser Steel Corp.*,
998 F.2d 783 (10th Cir. 1993) ..... 9

**Table of Authorities** (continued)

**Cases** **Page(s)**

*In re Lumbermens Mut. Cas. Co.*,
184 S.W.3d 718 (Tex. 2006) ..... 6

*Kilian v. Montgomery Hosp.*,
1995 U.S. Dist. LEXIS 452 (E.D. Pa. 1995) ..... 9

*League of Latin American Citizens v. Clements*,
884 F.2d 185 (5th Cir. 1989) ..... 8

*Liberty Mut. Ins. Co. v. Treesdale, Inc.*,
419 F.3d 216 (3d Cir. 2005) ..... 9, 12

*Local 93, Intern. Ass'n of Firefighters, AFL-CIO L.L.C. v. Cleveland*,
478 U.S. 501 (1986) ..... 6

*Martin v. Wilks*,
490 U.S. 755 (1989) ..... 5

*McConnell v. FEC*,
540 U.S. 93 (2003) ..... 5

*Milliken v. Bradley*,
418 U.S. 717 (1974) ..... 6

*Minnesota Mut. Life Ins. Co. v. Morse*,
487 S.W.2d 317 (Tex.1972) ..... 15

*NAACP v. New York*,
413 U.S. 345 (1973) ..... 5

**Table of Authorities** (continued)

**Cases** **Page(s)**

*New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*,
732 F.2d 452 (5th Cir. 1984) ..... 8, 13

*Public Serv. Co. of NH v. Patch*,
136 F.3d 197 (1st Cir. 1998) ..... 8

*Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*,
725 F.2d 871 (2d Cir. 1984) ..... 8

*Rhodes v. Chicago Ins. Co., Div. of Interstate Nat. Corp.*,
719 F.2d 116 (5th Cir. 1983) ..... 14

*Russell v. Hartford Cas. Ins. Co.*,
548 S.W.2d 737 (Tex. Civ. App.—Austin 1977,
writ ref'd n.r.e.) ..... 3

*S. Cal. Edison Co. v. Lynch*,
307 F.3d 794 (9th Cir. 2002) ..... 9

*Shaunfield v. Citicorp Diners Club, Inc.*,
2005 U.S. Dist. LEXIS 11244 (N.D. Tex. 2005) .. 12

*Stringfellow v. Concerned Neighbors in Action*,
480 U.S. 370 (1988) ..... 5

*Sutphen Estates, Inc. v. United States*,
342 U.S. 19 (1951) ..... 8

## Table of Authorities (continued)

**Cases** **Page(s)**

*Tiffany Fine Arts, Inc. v. U.S.*,
469 U.S. 310 (1985) ..... 6

*Venegas v. Mitchell*,
495 U.S. 82 (1990) ..... 5

*Zahn v. International Paper Co.*,
414 U.S. 291 (1973) ..... 6

**Statutes, Rules and Regulations**

FED. R. CIV. P. 17 ..... 13

FED. R. CIV. P. 24 ..... 8

TEX. R. CIV. P. 51 ..... 3

**Other**

3A MOORE'S FEDERAL PRACTICE,
¶ 17.07 (1982) ..... 13

6 MOORE'S FEDERAL PRACTICE,
§ 24.03 (3d ed. 1997) ..... 8

Wright & Miller, FEDERAL PRACTICE AND PROCEDURE:
CIVIL § 1543 ..... 13

## PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 21, 2005.

## OPINIONS BELOW

The opinion issued by the United States Court of Appeals for the Fifth Circuit is reported as *Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005), and is reproduced in the Appendix at App. 1. The order issued by the United States Court of Appeals for the Fifth Circuit that denied rehearing is reported as *Ross v. Marshall*, 456 F.3d 442 (5th Cir. 2006), and is reproduced in the Appendix at App. 2. The Amended Final Judgment from the United States District Court for the Southern District of Texas entered on August 20, 2003 is reproduced in the Appendix at App. 3. The United States District Court for the Southern District of Texas' Order denying the motion to intervene entered on September 15, 2003 is reproduced in the Appendix at App. 4.

## JURISDICTION

The Court has jurisdiction to review a civil judgment pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit entered judgment on September 21, 2005, and denied the Petitioners' motion for rehearing on July 11, 2006.

## RULE INVOLVED

This case involves the construction of Rule 24(a) of the Federal Rules of Civil Procedure, which reads:

### Rule 24. Intervenors

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

## STATEMENT OF THE CASE

Plaintiffs, a family of African-Americans, brought suit against Kent Mathews and his son, Wayne Mathews, and four other defendants for conduct that led to a cross burning in the Plaintiffs' yard on June 19, 2000.

Allstate insured both Kent Mathews and Wayne Mathews under a homeowners' insurance policy. However, Allstate refused to provide a defense to Wayne Mathews. Allstate did provide a defense to Kent Mathews under a reservation of rights, but on March 12, 2002, Allstate filed a separate declaratory judgment action, and contended that the homeowners' policy provided no coverage for either Kent

Mathews or Wayne Mathews. Allstate's separate coverage suit, styled *Allstate Texas Lloyds Insurance Company v. Wayne Gordon Mathews, et al.*, Civil Action No. H-02-0964, remains pending in the Southern District of Texas federal court.

On May 28, 2003, after a jury trial, the district court entered Final Judgment in which it imposed liability against all defendants except for Kent Mathews (CR 2666). On August 20, 2003, on reconsideration, the district court entered an Amended Final Judgment in which it found all defendants (including Kent Mathews) liable for actual damages, and the other defendants (except for Kent Mathews) liable for exemplary damages (CR 2792, 2845).

Allstate was not a party to the tort action brought against its insured. Texas is not a direct action state, so Allstate **could not** be a party to the tort action against its insured. *See* TEX. R. CIV. P. 51(b)(prohibits joinder of insurance company in third party suit against insured); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 740 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

Consequently, Allstate could not be, and was not, named in the judgment. Thus, Allstate is not directly liable for the judgment.

As the panel recognized, the only way that Allstate could ever be liable for that judgment was **IF** the court found in the separate suit that Allstate provided coverage to Kent and Wayne Mathews (for liability up to policy limits) and **IF** Allstate was found liable in the separate suit for bad faith settlement practices (for liability for extra-contractual damages). *See* App. 1, at 21-28 (citing cases).

Following that judgment, Allstate, which was not a party to the action, filed a motion to intervene, a post judgment "answer" (despite the fact that no one had alleged anything against it) and a notice of appeal. The basis of Allstate's motion to intervene was not to contest liability against its insured, but to "protect its monetary interest in the case." (CR 2845). When Allstate refused to post a supersedeas bond in the full amount of the judgment to protect its insured from execution on his assets during the pendency of the appeal,[1] Kent Mathews fired the defense counsel hired by Allstate and entered into an agreement with the Plaintiffs to delay execution while Plaintiffs sought recovery against Allstate in the separate suit.

On September 15, 2003, the district court denied Allstate's post-judgment motion to intervene, and struck its post-judgment answer and notice of appeal. On September 19, 2003, Allstate filed a notice of appeal from the district court's September 15, 2003 order.

On September 21, 2005, the panel of the United States Court of Appeals for the Fifth Circuit (Higginbotham, J., joined by Davis and Garza, JJ.) held that the district court erred in denying Allstate's intervention into the suit against its insured, holding that Allstate had satisfied all the requirements for intervention as a matter of right, under FED. R. CIV. P. 24(a). Then, rather than remand to the district court, the panel addressed the merits of the case, and reversed and rendered a take nothing judgment.

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[1] Allstate attempted to tender $300,000 (its policy limits) to supersede the over $10 million judgment, but the district judge denied that motion. Allstate never attempted to post a full supersedeas bond and Allstate has not appealed the district judge's denial of that motion.

The Ross family filed a petition for rehearing *en banc*. The Fifth Circuit considered it a petition for panel rehearing, and on July 11, 2006, denied the petition. App. 2.

## REASONS FOR GRANTING THE WRIT

This case concerns the proper construction of Rule 24(a) of the Federal Rules of Civil Procedure—the rule that governs intervention in a civil action as a matter of right. Because this case involves the right of a non-party insurance company to intervene post-judgment in a suit against its insured, solely to protect the insurance company's own coverage interests, the case presents important and recurring issues for civil litigators and courts.

This Court has not addressed the substantive requirements of Rule 24(a) in over forty years.[2] The opinion

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[2] Modern Rule 24(a) was enacted by amendment in 1966. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967). In 1971, the Court analyzed the nature of the interest required for intervention as a matter of right in Rule 24(a) in *Donaldson v. United States.*, 400 U.S. 517, 531 (1971). And, in 1973, the Court analyzed the timeliness of intervention under both Rules 24(a) and 24(b) in *NAACP v. New York*, 413 U.S. 345, 365-69 (1973). Since that time, the Court has cited, but not directly addressed any of the requirements of Rule 24(a). *See, e.g., McConnell v. FEC*, 540 U.S. 93, 233 (2003) (not addressing requirements for intervention because the issue was standing); *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (holding objecting class member could appeal without intervening); *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990) (permitting *permissive* intervention for contingent fee lawyer in §1983 case); *Martin v. Wilks*, 490 U.S. 755, 764-65 (1989) (holding Rule 19 joinder rather than voluntary intervention is required to bind someone to the judgment); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1988) (holding that order of permissive intervention was not appealable under collateral order doctrine); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 279 (1987) (holding that there was no appeal

below illustrates the confusion that courts face in construction of the rule. This is the first decision in the history of our nation's jurisprudence which ever allowed an insurer to intervene as a matter of right, post-judgment, in a lawsuit against its insured, for the sole purpose of minimizing its liability in a separate coverage action.[3]

Not only is the Fifth Circuit's panel's decision unprecedented, but it is also unsound. This case presents the Court with the unique opportunity to resolve the conflicts

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from Ninth Circuit's affirmance of district court's denial of intervention); *Local 93, Intern. Ass'n of Firefighters, AFL-CIO L.L.C. v. Cleveland*, 478 U.S. 501, 528 (1986) (noting intervention but it was not an issue in the case); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (holding that physician's intervention in abortion case did not confer standing); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 548 (1986) (holding that parent had no standing to challenge prayer in school without intervention as parent); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985) (cites Rule 24(a) in discussion of *Donaldson v. United States.*, but not an issue in case); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 n.4 (1983) (cites rule in discussion of rights of putative class members); *Milliken v. Bradley*, 418 U.S. 717, 730 n.12 (1974) (noting that district court permitted intervention, but not an issue in case); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559 (1974) (holding that statute of limitation for those who seek to intervene in class action is tolled when the class action is commenced); *Zahn v. International Paper Co.*, 414 U.S. 291, 306 (1973) (noting in dicta that courts have exercised ancillary jurisdiction over intervention).

[3] *See Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56, 64 (Mass. App. Ct. 2000)("The [insurer] cites no comparable case, and we are aware of none, in which an entity was permitted to intervene as of right to defend its interest in another lawsuit.")(identical facts); *but see In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006) (issued after opinion below, and relying on the Fifth Circuit's opinion here, to hold that a non-party insurance company could intervene in a mandamus proceeding).

among the courts of appeals and to provide guidance to the bench and bar on the limitations of Rule 24(a). Those issues are presented here in stark relief against the backdrop of a simple, straightforward record. Review should be granted.

## I. Allstate Could Not Intervene As A Matter Of Right Because Its Interest Was Contingent.

The Fifth Circuit's opinion below is in direct and irreconcilable conflict with those opinions from other courts of appeals that have held that a person cannot intervene as a matter of right to protect a contingent interest. The interest Allstate sought to protect was its "monetary interest." *See* Allstate's Motion to Intervene, at 7-8 (CR 2845). And, as the Fifth Circuit acknowledged, that interest was not triggered in this suit. App. 1. Rather, in order for Allstate to be found liable for the judgment, there must be two contingencies: (1) it must be found to provide coverage for Kent Mathews and Wayne Mathews (for liability up to policy limits); and (2) it must be found liable for bad faith settlement practices (for extra-contractual liability). The Fifth Circuit conceded such contingencies, yet granted Allstate's intervention anyway.[4] Prior to the Fifth Circuit's opinion, **every other** court that considered this type of contingent interest has held that it is insufficient for intervention as a matter of right.

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[4] The Fifth Circuit held that "although some **contingency** remains in that Allstate may still avoid liability if it prevails in its coverage action, we find this **contingency** insufficient to preclude intervention." App. 1, at 26. The court also held, "While this interest [minimizing its potential exposure in a bad faith claim] **is also contingent** upon an adverse finding in a separate suit, Allstate may minimize or eliminate this exposure by contesting the judgment against Mathews on appeal." *Id.* at 26.

To intervene as a matter of right, the applicant must have "an interest relating to the property or transaction which is the subject of the action . . . ." FED. R. CIV. P. 24(a). This Court, in *Donaldson v. United States,* held that the applicant's interest must be "a significantly protectable interest." 400 U.S. 517, 531, 91 S. Ct. 534, 542, 27 L. Ed. 2d 580 (1971). Courts of appeals have described this interest as a "direct, substantial, legally protectable interest in the proceedings." *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir. 1984)(citing cases). And, courts of appeals have held that a mere economic interest in the judgment is not enough to justify intervention as a matter of right. *Id.* at 464 ("By requiring that the applicant's interest be not only 'direct' and 'substantial,' but also 'legally protectable,' it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant."). Further, intervention as a matter of right cannot rest on an interest that is remote or collateral to the main action. *See League of Latin American Citizens v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989); *see also* 6 MOORE'S FEDERAL PRACTICE, § 24.03[2][a] at 25-29 (3d ed. 1997).

Because an interest sufficient to justify intervention as a matter of right must be direct interest, it cannot be a contingent interest. *See, e.g., Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 22-23 (1951)(involving earlier rule) ("But we have said enough to show that the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene"); *Public Serv. Co. of NH v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)("a putative intervenor must show at a bare minimum that it has 'a significantly protectable interest,' ... that is 'direct, not contingent'"); *Restor-A-Dent*

*Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984)("Moreover, it is said that such an interest must be direct, as opposed to remote or contingent."); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005)("An interest contingent upon a favorable result in an associated lawsuit is not an interest sufficient to require intervention under Rule 24(a)."); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)("Thus, Reliant and Mirant are claiming a right to intervene based on a contingent, unsecured claim against a third-party debtor. This falls far short of the 'direct, non-contingent, substantial and legally protectable' interest required for intervention as a matter of right."); *In re Kaiser Steel Corp.*, 998 F.2d 783, 790-791 (10th Cir. 1993)("The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right."); *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310-1311 (11th Cir. 2004)("a nonparty must have a 'direct,' 'substantial,' and 'legally protectable' interest in the action rather than a merely speculative or contingent interest").

Other courts, applying the same rules as applied here, have denied intervention to insurers who sought to intervene as a matter of right to seek to protect their contingent liability interests. *See Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56, 64 (Mass. App. Ct. 2000)[5] (identical facts to this case); *Kilian v. Montgomery Hosp.*, 1995 U.S. Dist. LEXIS 452, 3-5 (E.D. Pa. 1995)(insurer cannot intervene to challenge postjudgment interest awarded in the judgment); *see also In re Healthsouth Corp. Ins. Litigation*, 219 F.R.D. 688,

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[5] Massachusetts modeled its intervention statute after Rule 24, and looks to federal case law for guidance.

693 (N. D. Ala. 2004)(plaintiff could not intervene in insurer's coverage action for the same reasons).

The Fifth Circuit paid lip service to these requirements. App. 1, at 21. But, then, the court disregarded them. *Id.* ("*Despite these requirements*, we have observed that 'the interest test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."). However, even those cases relied upon by the Fifth Circuit for this proposition required—as this Court and other court of appeals opinions require—a direct, legally protectable interest, that is not remote nor contingent.[6]

On rehearing, the Fifth Circuit again paid lip service to the requirement of a direct interest. In fact, the Fifth Circuit acknowledged that when an insurer defends under a reservation of rights and reserves the right to challenge coverage later, its "interest is insufficient for intervention." App. 2, at 2. However, the Fifth Circuit attempted to distinguish that line of cases by saying that Allstate had only issued a "limited reservation of rights," because it accepted liability for Kent Mathews' negligent conduct.[7] That distinction cannot apply

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[6] The Fifth Circuit cited and acknowledged two opinions—one from the Second Circuit and one from the First Circuit that hold, unequivocally, that an insurer does not have a right to intervene in an insured's tort suit to protect the insurer's interest to minimize liability. *See* App. 1, at 21-24. The Fifth Circuit attempted to distinguish those cases—in our view unsatisfactorily –yet did not cite a single opinion that holds in favor of the Fifth Circuit's result.

[7] "Once Allstate accepted coverage over any negligence liability on the part of Kent Mathews, they had a direct interest in the liability lawsuit." App. at 2, at 3.

here because Kent Mathews' negligence played no part in this appeal. The jury answered "no" to Kent Mathews' negligence—a finding unchallenged by any party on appeal. The district court's judgment was based upon agency principles, a matter on which Allstate continues to contest coverage in its pending litigation. Thus, at the time of its intervention as a non-party to pursue an appeal to protect its own interests, Allstate had no direct interest in the judgment.

Because the Fifth Circuit's opinion conflicts with the opinions of this Court and of other courts of appeals, and does not follow the language of the rule or the case law, the opinion should be reviewed.

## II. Allstate Could Not Intervene As A Matter Of Right Because Its Rights Can Be Resolved In A Separate Suit.

There is another related, yet independent reason why this Court should grant review. Well-settled law establishes that an applicant is not entitled to intervene as a matter of right where the applicant can protect its interests through a separate lawsuit.

A leading case on this subject is the Fifth Circuit's own *Deus v. Allstate Ins. Co.*, 15 F.3d 506 (5th Cir. 1994), *cert. denied*, 513 U.S. 1014 (1994). In that case, an Allstate agent sued Allstate for intentional infliction of emotional distress. While that suit was pending, a nonparty sought to intervene as a matter of right to gain access to sealed testimony and discovery. However, that nonparty was already participating in a lawsuit against Allstate in a federal court in Nevada. The court held: "Intervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim

through some other means." *Id.* at 526 (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970)). Because the nonparty already had a pending federal suit in which he could assert his interest, the court held that the district court properly denied intervention.

This sensible holding[8] comports with a long line of cases from other forums which held that one may not intervene as a matter of right if one can protect its interests in a separate suit. *See, e.g., Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005)("a mere economic interest in the outcome of litigation is insufficient to support a motion to intervene. Thus, the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene."); *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977)(holding that mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene); *Shaunfield v. Citicorp Diners Club, Inc.*, 2005 U.S. Dist. LEXIS 11244, 16-18 (N.D. Tex. 2005)("Thus, the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene.").

The Fifth Circuit opinion here is in direct and irreconcilable conflict with that line of case. Allstate could not be liable for the judgment against its insureds, not with a separate coverage action pending in federal court. Rather, Allstate's liability would be determined in the second suit, in those series of contingencies acknowledged by the Fifth

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[8] Petitioners cited *Deus v. Allstate* in their Brief of Appellees, but the Fifth Circuit took no notice of it.

Circuit. Because Allstate could protect itself from liability in the second suit, Allstate had no right to intervene. This Court should take this opportunity to clarify the requirements of Rule 24(a) to provide guidance for courts and litigants.

## III. Allstate Could Not Intervene As A Matter Of Right Because It Is Not Bound To The Judgment Against Its Insured.

Finally, regardless of the Fifth Circuit's paeans to the "practical" or "flexible" or "liberal" way of looking at the rules, this Court and the courts of appeals have clearly defined what constitutes a protectable interest sufficient to justify intervention as a matter of right. And, Allstate does not meet that requirement.

The clear principles were discussed in the Fifth Circuit's opinion in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir. 1984). Relying on this Court's authority, the Fifth Circuit held that the interest required is "one which the substantive law recognizes as belonging to or being owned by the applicant." *Id.* at 463. To show this, applicant must show that it is "the real party in interest." The real party in interest requirement of FED. R. CIV. P. 17(a) "applies to intervenors." *Id.*[9] And, also applicable to intervenors is the rule that "a party has no standing to assert a right if it is not his own." *Id.*

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[9] *See also* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1543 at 646 ("... the real party in interest requirement ... must be satisfied for purposes of asserting ... a claim by an intervenor"); 3A MOORE'S FEDERAL PRACTICE, ¶ 17.07 at 17-77 (1982) ("Rule 17(a) applies to ... intervenors ...").

Here, Allstate sought to intervene to assert the rights to appeal a judgment against its insured. The Fifth Circuit mistakenly said that Allstate was in privity with the insured. It was not. Because Allstate was defending under a reservation of rights and had filed a separate coverage action against its insured in federal court—and, because it had abandoned its insured when it refused to post the full supersedeas bond to protect its insured's assets from execution on appeal—Allstate was not in privity with its insured. *See Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 826 (Tex. App.—Dallas 1992, writ denied); *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1128 (5th Cir. 1993); *cf., Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.*, 32 F.2d 425, 427-428 (8th Cir. 1929)(holding an insurer liable for failing to protect its insured at all stages of the litigation, including the posting of a supersedeas bond). The reservation of rights letter provided the insured with notice of this conflict of interest between him and his insurer. *Rhodes v. Chicago Ins. Co., Div. of Interstate Nat. Corp.*, 719 F.2d 116, 121 (5th Cir. 1983).

The Fifth Circuit also mistakenly stated that Allstate did not need to intervene prior to judgment because the attorneys it hired to represent the insured were protecting Allstate's interest. That is also incorrect. Under Texas law, an attorney cannot serve two masters. He cannot protect the insurer's interests. *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973). The fact that there is a reservation of rights means that the attorney **cannot** work for the insurer, without violation of his ethical code. *Id.*

Finally, although muted in the opinion, the case law is clear that an insurer is **not bound** by a judgment against its insured. Where there is a reservation of rights, the only way the insurer is liable is **IF** coverage is found in a separate suit (for

liability for policy limits) and **IF** the insurer is found liable in the separate suit for bad faith settlement practices. *See* App. 1, at 23-28 (citing cases). And, Texas law is clear that the insurer is **not bound** based on waiver or estoppel or even based on recitations in the judgment against insured. *See Employers Cas. Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988)("[W]e do not agree with [the court of appeals'] conclusion that the recitation in the agreed judgment that the damage resulted from an occurrence of August 6, 1980 is binding and conclusive against Employers Casualty in the present suit"); *Minnesota Mut. Life Ins. Co. v. Morse*, 487 S.W.2d 317, 320 (Tex.1972) ("waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended.").

Thus, Allstate was not in privity with its insured. Allstate was not liable to pay the judgment (without findings in a separate suit). Allstate was **not bound** to the judgment, or any of the recitations in the opinion. Allstate did not have a legally protectable property interest in the judgment. Allstate was not a real party in interest.

While all this may sound like an esoteric, academic discussion about the proper construction of Rule 24(a), the Fifth Circuit's construction of the rule will have dramatic, practical effects on civil litigation. Henceforth, insurers will no longer need to post supersedeas bonds to appeal judgments against their insureds. With the Fifth Circuit opinion in hand, all an insurer need do is wait to see how the judgment comes out. If judgment is unfavorable to the insured, the insurer need do nothing to protect its insured. Rather, the insurer, as here, can abandon its insured and seek only to protect its own hide. The Fifth Circuit's opinion encourages the insurer to intervene post-judgment and, without posting any supersedeas bond, to

appeal the merits—permitting it a **super-appellant** status enjoyed by no other appellant. And, the insurer can do this with impunity because, under Texas law, a plaintiff cannot execute its judgment against the insurance company.

Thus, the Fifth Circuit's decision not only upsets the delicate balance between insurers and insureds, but is also so far out of the mainstream and in such conflict with other courts that it must be corrected. This is an opinion of exceptional importance which should be considered by the Court.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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